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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 240

FEDERAL TRADE COMMISSION, *Petitioner,*

vs.

ALGOMA LUMBER COMPANY, ET AL., *Respondents.*

BRIEF OF EDWARD S. ROGERS, AS AMICUS CURIAE ON BEHALF OF

Weyerhaeuser Sales Company, St. Paul, Minnesota,
Weyerhaeuser Timber Company, Klamath Falls, Oregon,
Madera Sugar Pine Company, Madera, California,
Yosemite Lumber Company, Pinedale, California,
Sugar Pine Lumber Company, Pinedale, California,
Northern Lumber Company, Cloquet, Minnesota,
Johnson-Wentworth Company, Cloquet, Minnesota,
Cloquet Lumber Company, Cloquet, Minnesota,
Boise-Payette Lumber Company, Boise, Idaho,
Bonners Ferry Lumber Company, Ltd., Bonners Ferry, Idaho,
Humbird Lumber Company, Sand Point, Idaho,
Potlatch Forests, Inc., Potlatch, Idaho,
Edward Rutledge Timber Company, Ceeur d'Alene, Idaho,
Clearwater Timber Company, Lewiston, Idaho,
Winton Lumber Company, Gibbs, Idaho,
J. Neils Lumber Company, Libby, Montana,
Deer Park Lumber Company, Deer Park, Washington,
McGoldrick Lumber Company, Spokane, Washington,
Dalkena Lumber Company, Dalkena, Washingon,
Cascade Lumber Company, Yakima, Washington,
Hallack & Howard Lumber Company, Denver, Colorado,
Edward Hines Lumber Co., Burns, Oregon,
Kalispell Lumber Company, Kalispell, Montana,
Kinzua Pine Mills Co., Kinzua, Oregon,
McCloud River Lumber Co., McCloud, California,
Michigan-California Lumber Co., Camino, California,
Polleys Lumber Co., Missoula, Montana,
Shevlin-Hixon Co., Bend, Oregon,
State Lumber Co., Columbia Falls, Montana,
H. E. Brown Timber Company, Sand Point, Idaho,
MacFarland-Brown Lumber Company, Sand Point, Idaho,
Craig Mountain Lumber Company, Winchester, Idaho,
Pondosa Pine Lumber Company, Elgin, Oregon,
Stoddard Lumber Company, Baker, Oregon,
Peshastin Lumber & Box Company, Peshastin, Washington,
Brooks Scanlon Lumber Company, Bend, Oregon,
Kellogg Lumber Company, Dishman, Washington,
Mt. Emily Lumber Company, LaGrande, Oregon,
Atlas Tie Company, Coeur d'Alene, Idaho,
Somers Lumber Company, Somers, Montana,
Blackwell Lumber Company, Coeur d'Alene, Idaho,
Western Pine Manufacturing Company, Ltd., Spokane, Washington.

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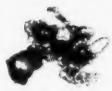

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ALGOMA LUMBER COMPANY, *et al.*,
Respondents.

BRIEF AMICUS CURIAE.

This brief, by leave of court, is filed on behalf of the lumber companies whose names are printed on the cover. They are in direct competition with the respondents and are in two categories: (1) producers of true White Pine lumber who use the designation "White Pine" truthfully and who are compelled to meet respondents' competition in selling a different and cheaper lumber represented as White Pine; and (2) producers of lumber from Ponderosa Pine who sell it under names which do not misrepresent it as white pine. These parties are obliged to meet the competition of the respondents who, by applying a designation which includes the words "White Pine" to Ponderosa Pine (which is not White Pine, either in scientific or in common understanding), are enabled to obtain a wider market and a better price for the same product and

encounter less trade resistance in its sale.* Thus, those in the second group, because they are unwilling to apply a false description to the lumber that they sell, are handicapped in their competition with respondents.

Respondents' use of trade designations including the words "White Pine" gives them an unfair advantage over competitors in both classes.

The misdescription which the court below permitted respondents to continue, cannot be employed without taking away an appreciable portion of their market from the competitors of the respondents in one group or the other.

The Public Interest.

Respondents' methods inflict an injury on the public as well as upon their competitors. The misdescription fosters the substitution of a wood unfit for many of the purposes for which White Pine is well known to be fit and thus consumers are led, by respondents' misuse of the words "White Pine", into paying their money for lumber not intended to be bought and which might not otherwise be considered. The consumers who are thus misled are potential customers of the parties on whose behalf this brief is filed. They are in the market ordering "White Pine" and expecting to get true White Pine which these parties mill and sell, or they might buy Ponderosa Pine if sold on its merits and not under a disguise.

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* Willis J. Walker, president of the Red River Lumber Company, one of the respondents and one of the most prominent "California White Pine producers", testified (Rec., 1551):

"Q. You think there is an advantage in the use of the word 'white' in connection with the term 'California white pine'? A: Yes.

Q. Have you at any time estimated that it is worth about $2 a thousand to the California white pine manufacturers? A. I don't remember ever having tried to put it in dollars and cents.

Q. But you think it has a monetary advantage to you. A. I do.

Q. Why is that? A. Because it classifies our woods with the other woods that have been known to the trade, including itself as white pines, the general group with this (sic) similar characteristics.

Q. Well, now, that is one of the reasons you want to continue to use it, is it? A. That is one of the reasons; yes."

It is no answer to say that Ponderosa is a good wood for certain purposes and that purchasers, who buy it as White Pine, although fooled, are not much hurt. As far back as 1848, in a case where it was argued that there was no actionable misrepresentation because the spurious article was as good as the genuine, the defense was disposed of with the remark, "The privilege of deceiving the public, even for their own benefit, is not a legitimate subject of commerce." (*Partridge* v. *Menck*, 2 Sandf., Ch. 622, How. App. Cas. 558.) As Mr. Justice Butler said in *U. S.* v. *95 Barrels of Vinegar*, 265 U. S. 438, 444, 445:

> "If an article is not the identical thing that the brand indicates it to be it is misbranded. * * * And it makes no difference whether vinegar made from dried apples is or is not inferior to apple cider vinegar."

Respondents' Methods Are Unfair.

As the direct result of respondents' methods, the producers of true White Pine and Ponderosa Pine, truthfully named, are deprived of their legitimate market. Potential customers are taken away from them by competitors' misrepresentation. The public is being deceived into purchasing lumber not intended to be purchased and for uses for which it is not adapted. Respondents' misuse of a trade description which includes the words "White Pine" is the instrument of fraud which produces these results.

That respondents' use of the expression "California White Pine" is a method of competition was found by the court below (Rec., 1890). That it is an unfair method seems almost too plain for denial. It is false. It deceives the public. It injures competitors. It is an artifice by which one group of traders secure for themselves custom which, but for it, would probably come to another group. It is the appropriation by respondents for their lumber, of

credit which another wood has earned. By this means, respondents' lumber is given a salability it would not otherwise have.* Respondents thus secure an advantage over their competitors. This is unfair competition at common law. As Mr. Justice Holmes said in *International News Service* v. *Associated Press*, 248 U. S. 215, 246:

> "If a given person is to be prohibited from making the use of words that his neighbors are free to make some other ground must be found. One such ground is vaguely expressed in the phrase unfair trade. This means that the words are repeated by a competitor in business in such a way as to convey a misrepresentation that materially injures the person who first used them, by appropriating credit of some kind which the first user has earned. The ordinary case is a representation by device, appearance, or other indirection that the defendant's goods come from the plaintiff. **But the only reason why it is actionable to make such a representation is that it tends to give the defendant an advantage in his competition with the plaintiff and that it is thought undesirable that an advantage should be gained in that way.**"

The fact that those injured by the misrepresentation are so numerous that it is doubtful if an action could be maintained by any one of them, is one of the reasons which moved Congress, in the public interest, to confer upon the Commission jurisdiction over such wrongs.*

No one would have any complaint if the producers of Ponderosa Pine should compare it with White Pine and point out the good qualities which Ponderosa admittedly has, its usefulness for interior trim, its abundance, its moderate price. In short, an effort to sell this wood on its merits, under its own proper name, or under some trade name not including the phrase "White Pine", would be commendable and fair competition, but to disguise it under a name which inevitably suggests another wood seems un-

* *Roy. Baking Powder Co.* v. *Federal Trade Commission* (C. C. A. 2), 281 Fed. 744, 751, 753.

fair and we should suppose, unlawful. As early as 1846, Senator Lott remarked, in *Taylor* v. *Carpenter*, 11 Paige, 292, 2 Sandf. Ch. 603:

> "A disguise is not usually assumed for an honest object. It is a mark more characteristic of deception and fraud. It defeats the very end and object contemplated by legitimate competition, the choice to the public to select between the articles exposed to sale."

The essence of fair competition, where names and brands are concerned, is the opportunity to choose between goods offered for sale. In no other way can good will and good reputation be perpetuated and profited by. If purchasers have no chance to distinguish between an article desired and one not desired or not known, there could be no credit for good merchandise, no responsibility for bad, and no competition except in cheapness and sophistication.

While in this case, as was found, the term "California White Pine" may originally have been used to distinguish Ponderosa Pine from Southern Yellow Pine, the respondents now desire to perpetuate the term in order to enjoy the resulting identification of their lumber in the public mind with true White Pine, and the larger profit which admittedly accrues to them from the use of the words "White Pine". While the original use of the term may have been innocent, continuation, after attention had been called to the confusion it was producing, is fraudulent and unfair.

In *Cochrane* v. *McNish* (1896), A. C. 225, 13 R. P. C. 100, 107, Lord Morris said:

> "The respondents erred unwittingly at first. But as they persisted in their error after their attention was called to the fact that they were infringing the appellant's rights, their conduct, in the eye of the law, amounts to fraud, and they must be held responsible for the consequences."

In *Huntley & Palmer* v. *The Reading Biscuit Co.*, 10 R. P. C., 277, 280, Mr. Justice Chitty said:

> "Again, the defendants set up by their counsel, and they set up on the affidavits that they did not mean anything wrong, and their intentions were fair and proper at the time. I need not refer to what Lord Justice James has said on this matter in *Hendriks* v. *Montagu*, L. R., 17 Ch. D., 638, p. 646, as to stealing a plaintiff's name, and as to its being a defendant's persistence, after his attention has been called to his use of the plaintiff's name, that justifies the court in using a harsh term."

That a deceptive practice has been going on for some time is an added reason why it should be stopped, not continued. The test is, not how long a misrepresentation may have been used, but whether it still deceives.

The Word "California" in Respondents' Trade Description Is Not a Distinction.

The use by respondents of the qualifying word California —"California White Pine"—in their trade description of Ponderosa lumber, is not a distinction which would prevent deception. The true White Pines have always been distinguished as to their geographical origin by the use of locality names. The Commission found:

> "This lumber is often referred to merely as 'White pine'. Of its other names the commonest is 'Northern white pine'. It is also given various designations including 'New England white pine', 'Maine white pine', 'Michigan white pine', 'Michigan cork pine', 'Wisconsin white pine', 'Minnesota white pine', 'Canadian white pine', 'New Brunswick white pine', among others." (Par. 13, Rec., 30.)

This finding is directly supported by the testimony. (Rec., 415, 417, 504, 899, 921, 985, 1067.) The fact is assumed by many witnesses, (Rec., 109, 242-3, 271, 291, 510, 547, etc.), and indeed it is a matter of common knowledge.

It is unreasonable to expect the architect and general

buyer or even the majority of retailers to know that each of the various white pines from "Maine white pine" and "New Brunswick white pine" in the east to "Idaho white pine" in the west, are true white pines and yet that "California white pine", "New Mexico white pine" and "Arizona white pine" are not. Prefixing the geographical name does not distinguish, but adds to the confusion and makes discovery of the deception all but impossible. "California White Pine" would be understood to mean, not that the wood is not White Pine at all, but that it is White Pine coming from California. The situation is analagous to the use of a defendant's name in connection with the plaintiff's trade-mark. "That is an aggravation and not a justification, for it is openly trading in the name of another upon the reputation acquired by the device of the true proprietor." (*Menendez* v. *Holt*, 128 U. S. 514, 521.)*

The Opinion of the Court Below.

Algoma Lumber Co. v. *Federal Trade Commission*, 64 Fed. (2d) 618 (Rec., 1889).

The Circuit Court of Appeals, without overruling the Commission's findings, made some of its own which would

* "'Duraleather' is a coined word. 'Dura' admittedly is an abbreviation of the word 'durable', and the word thus composed can be given no other meaning than 'Durable leather'. So read and considered it is an assertion that the product marked, advertised and sold as 'Duraleather' consists of leather. By putting this imitation product bearing a false name into the channels of trade, whatever may have been the petitioner's motive in so doing, they furnished their customers and those dealing with them the means to misrepresent that the goods made from that product were made of leather, and when such a false trade name is subsequently associated with the sale of goods made from such product, the petitioners cannot escape legal responsibility by disclaiming any intention to deceive or by showing that those with whom they dealt directly—first purchasers of the product—well knew that it was but an imitation or substitute for the genuine article. While this imitation leather, as it passed from the petitioners in the first instance, was to its customers a finished product, it was to their knowledge and purpose to be used ultimately in upholstering and in the manufacture of suitcases and other goods and to come into the hands of those usually called the consuming public." *Masland Duraleather Co.* v. *Federal Trade Commission* (C. C. A. 3), 34 Fed. (2d) 733, 736.

seem to confirm those of the Commission and lead to a conclusion exactly contrary to the one reached by the court. The court found:

> "That the use of the expression 'California White Pine' is a method of competition, there is no question." (Rec., 1890.)

The court stated that the only questions are, is it an unfair method and is the proceeding in the interest of the public? Concerning the falsity of the description complained of, the court concedes that:

> "Pinus Ponderosa belongs botanically with the so-called 'yellow pine' group." (Rec., 1890.)
>
> * * * * * * *
>
> "The only species of true botanical 'white pines' of commercial importance are Northern White Pine, and two Pacific coast varieties—Idaho White Pine and Sugar Pine." (Rec., 1890.)

That the misdescribed lumber is inferior is also admitted. The court says:

> "That there is a greater percentage of sap wood content in ponderosa lumber than there is in the true white pine lumber, there is no question. This variation, however, appears to be of importance only as it has a bearing upon the relative durability of the two classes of lumber. It is the sapwood which was found by the Commission to be more subject to decay when applied to exterior uses." (Rec., 1893.)*

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* Willis J. Walker, president of the Red River Lumber Company, one of the respondents, testified. (Rec., 1556):

> "Q. Is the trade unable or is it able to tell the California white pine from the so-called genuine white pines by appearance? A. I think so—by appearance—I don't know, not necessarily.
>
> Q. In the clear grades, the California white pine is largely sap, isn't it, rather than heart in character? A. The clear grade will run more to heart; yes.
>
> Q. More to heart? A. More to sap—excuse me."

The inferiority of sapwood to heartwood in joinery has always been recognized. In Robert Greene's "**A Quip for an Upstart Courtier, or A Quaint Dispute between Velvet Breeches and Cloth Breeches**", 1592 (Crosart, Works, Vol. 11, p. 270), there is an argument between a plain man and a courtier, each pointing out the vices of the other's class. Velvet Breeches cites the rascality of the various trades,—the saddler

Durability is one of the factors which influence the purchase of building material.

The court then quotes from the testimony of five witnesses who state that Ponderosa lumber is well known to be unsatisfactory for exterior use, but concludes that although buildings of true White Pine have survived for two hundred years, the use of Ponderosa is too recent to permit of comparison, notwithstanding the fact that it is known to rot quickly when exposed to the weather. The court concludes,

> "What the testimony appears to establish is that Northern white pine has relatively a greater durability for exterior use without establishing any comparative degree of such durability." (Rec., 1895.)

This is equivalent to saying that Ponderosa is inferior in durability to true White Pine, so we have up to this point, findings by the court below that so-called "California White Pine" is misdescribed, that it is not White Pine, and that it is inferior to genuine White Pine.

The court then quotes testimony showing that architects and others are deceived by the use for Ponderosa, of trade names which include the words White Pine, but comments:

> "Just why architects and lumber dealers should be confused in view of the aid and assistance furnished by the government through the Bureau of Standards is not readily apparent." (Rec., 1895.)

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for selling cheap skin as if it came from Muscovy or Calabria; the cutler, a blade that can only be thrust into a bushel, swearing it came from Turkey or Toledo; the butcher for selling a piece of an old cow for a chop from a young ox; Tom Tapster for filling the poor man's can of small beer half full of froth; and "the joiner, though an honest man, yet he maketh his joints weak, and putteth in sap in the mortices, which should be the heart of the tree, and all to make his stuff slender".

Oxford Dictionary, Vol. VIII, p. 100.

Architects and lumber dealers are in fact confused, but, the court thought they ought not to be.*

The court then cites testimony showing passing off of "California White Pine" on specifications for White Pine and refers without dissent to the testimony of a witness who estimates the amount of this substitution to be "about ninety-five per cent". (Rec., 1896.)

This shows that 95 per cent of the trade are in fact confused by a misdescription into buying an inferior wood for a superior one, although "just why" they "should be confused * * * is not readily apparent." The apparent, indeed the only, cause of the confusion is respondents'

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* This seems completely to overlook the well-known rule that if a false representation in fact deceives the person to whom it is made, it is unlawful:

> "Defendants' contention that customers need not have been deceived, had they taken note of the differences disclosed to their senses in the appearance between the Prest-O-Lite package filled by complainant and such package filled by defendant, is answered by the truism that the imitation need not be such as to mislead the careful and discriminating purchaser; it is enough that it misleads the ordinary and casual buyer." *Auto Acetylene Light Co.* v. *Prest-O-Lite Co.* (C. C. A. 6th) 264 Fed. Rep. 810, 813.

Indeed the courts have often said that any representation is unlawful which is likely to deceive the "unwary". (*Battle* v. *Finlay*, 45 Fed. 796, 798; *Liebig's Extract of Meat Co.* v. *Chemists Co-Op. Co.*, 13 R. P. C. 635; C. A. 13 R. P. C. 736, 739, Lord Justice Smith: "The real question in this case is whether the Defendants' goods are made up in such a way as to deceive an unwary purchaser." In *McLean* v. *Fleming*, 96 U. S. 245, 256, Mr. Justice Clifford speaks of the deception of "the unwary". Anything "which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law", Mr. Justice Bradley in *Celluloid Mfg. Co.* v. *Cellonite Mfg. Co.*, 32 Fed. 94, 97; in *Florence Mfg. Co.* v. *J. C. Dowd Co.*, 178 Fed. 73 (C. C. A. 2), it is said that the law is made for the protection of the "ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances, and general impressions." This court has held that the test is "* * * the eye of an ordinary observer giving such attention as a purchaser usually gives", Mr. Justice Strong in *Gorham Co.* v. *White*, 14 Wall. 511, 528. It has been held that a purchaser has a right to be careless. *Pillsbury* v. *Pillsbury*, 64 Fed. 841, 847 (C. C. A. 7):

> "Indeed, some cases have gone to the length of declaring that the purchaser has a right to be careless, and that his want of caution in inspecting brands of goods with which he supposes himself to be familiar ought not to be allowed to uphold a simulation of a brand that is designed to work a fraud upon the public. However that may be, the imitation need only to be slight if it attaches to what is most salient, for the usual inattention of a purchaser renders a good will precarious if exposed to imposition."

false trade description. It seems as if the court below substituted its own conjecture for proved facts.

In reference to the respondents, the court says (Rec., 1896):

> "With the exception of the possible question of durability, the materiality of which has not been established, it does not otherwise appear the public is injured by action of such manufacturers."

If this statement means what it unmistakably says, it is incredible that any court should hold that the inferior quality of the article passed off on a purchaser for and under the name of a superior one is not material. To say that in such circumstances the public is not injured is to deny the obvious. The injury is two-fold: (1) The article passed off is not the one expected; (2) It is not as good.

The court then refers to the *Winsted* case which it distinguishes by saying (Rec., 1897):

> "The sale or purchase of a material as all wool which in fact is in large part cotton presents a situation which may not be said to be parallel to that presented upon the facts in this case. If a material from a gray wool from some other breed of sheep than a Merino were dealt with in commerce under the name of 'Merino' or 'Gray Merino', then there might be some parallel between the two cases."

To apply this reasoning to the present case, no one could be deceived unless, on specifications for White Pine, there should be furnished not wood, but imitation wood. In short, it seems to have been held below that deception must be by nouns and cannot be by adjectives. This court has held the exact opposite: In *Brougham* v. *Blanton Mfg. Co.* 249 U. S. 495, Mr. Justice McKenna said, 502:

> "There may be value in the use of the trade-mark 'Creamo', as the company asserts, and detriment, it may be, in any change or qualification of it; but its value may be in its deception—its suggestion of cream appealing to the popular preference for that article

over skimmed milk, though the scientific judgment may be in favor of the latter, a judgment possibly not known, or if known not appreciated or accepted." * * *

"If 'Creamo Oleomargarine' is to be regarded as the name of the product it is false and deceptive * * *".

The product was in fact oleomargarine.

After further discussion, the court below continues (Rec., 1897):

"It may be conceded that the evidence establishes hat Northern White Pine lumber from the forests of Minnesota and Idaho White Pine lumber possess certain qualities which make those lumbers a superior grade to lumber produced and sold as California White Pine. When we compare Idaho White Pine with Northern White Pine we find that the Department of Agriculture (Exhibit 21) records the former as possessing greater strength and stiffness, but with all a softer quality."

Thus again admitting that the imitation is not as good as the genuine.

The court concludes thus (Rec., 1898):

"The supply of the botanical true white pine is far more limited than that of Ponderosa. The public is not only interested in not being deceived in the material it purchases under a certain nomenclature, but possibly in an even larger sense in the conservation of the forests."*

*The court below, in discussing the production of white pine (Rec. 1890) mentions that part of the supply of white pine is taken from "second growth from the original forests stretching throughout the northern and eastern sections of the United States from Minnesota to the Atlantic coast." Later the court said "the fact may not be overlooked that the greater portion of the annual production of (white pine) comes from second growth timber." This was taken to be "suggestive of the fact that the public interest is not promoted by the premature cutting of second growth timber." (Rec. 1898). However, a recent publication of the Forest Service indicates that production in California is just reaching the stage where second growth is of commercial significance: It is there stated that "the area of virgin timber constitutes about 41 per cent of the area of all commercial timber in California, including redwood." The Forest Service points out that "with the continued depletion of old-growth stands" in California there is "increasing need" for study and recognition of the commercial importance "of the second-growth timber that is rapidly coming in on many cut-over areas in this region." *Preliminary Yield Tables for Second-Growth Stands in the California Pine Region*, Technical Bulletin No. 354, Department of Agriculture, June 1933, pp. 4, 20.

Therefore, the conclusion seems to have been reached that in the interest of forest conservation, misrepresentation, deception, unfair methods of competition, and any sort of commercial depravity, should not be interfered with.

Conclusion.

The parties on whose behalf this brief is filed have a real interest in this case. As previously stated, they comprise those who produce lumber from true White Pine and truthfully describe it, and those who produce lumber from Ponderosa pine and do not misdescribe it. The importance of this case to them is plainly deduced from the record.

The volume of Ponderosa lumber in former years of normal production was 2,800,000,000 feet b. m. That of the three true White Pines was 1,600,000,000 feet. (Findings, Par. 28; Rec., 33, Statistical Bulletin 21, Dept. of Agriculture; Commission's Ex. 34-G, Rec., 945; Commission's Ex. 27, maps; Commission's Ex. 39 A & B, Rec., 957, 958.) Of the latter about 467,000,000 feet was of second growth White Pine (Commission's Ex. 27), used for inferior purposes not of interest in this case. On the other hand more than half of the Ponderosa production is now given names (chiefly 'pondosa") which do not include the words "White Pine". (Findings, Par. 33; Rec., 34; cf. state by state Forestry Service figures in Commission's Ex. 27 with Commission's Ex. 34-F and 35, Rec., 945.)

Hence the aggregate of the "pondosa pine" and true White Pine (the producers of both of which are injured by the use of the term "California White Pine") is in volume approximately twice as great as the volume of Ponderosa sold as "California White Pine", or under

similar misdescriptions. When the difference in price is taken into account, the value of the product of competitors injured by respondents' unfair methods is substantially more than twice the value of the products sold by respondents under the misleading names used by them.

With respect to the damage to competitors resulting from respondents' trade term it is, of course, unnecessary under the authorities to prove that dealers who do not misdescribe their lumber have lost specific orders to "California White Pine" producers, or that particular purchasers have been deceived.

The evidence in this record shows injury more positively than this. It shows that diversion of business from true White Pine and from Ponderosa Pine sold as such, to "California White Pine" is **a practice** on the part of a substantial portion of dealers at various typical centers of trade. The court below quoted testimony which estimated this substitution as 95 per cent. (Rec., 1896.)

The trade practice complained of in this case is of precisely the same sort as that condemned by this court in *Federal Trade Commission* v. *Winsted Hosiery Co.* 258 U. S. 483. It is unfair to the public because the description is untrue and misleading. It is unfair to the parties on whose behalf this brief is filed because it subjects them to a kind of competition which they should not have to meet. The decree below deprives the producers of true White Pine of the higher price legitimately obtainable for it and takes from them the value of the good will which this wood has earned during the past two centuries. The decree will compel the producers who now sell Ponderosa lumber on its merits to apply a false designation to it before they can compete in the same product on equal terms with respondents. The public will have to take care of itself.

These are the conditions forced upon the industry by respondents' persistent misuse of the term White Pine and the decision of the court below sanctioning it.

Respectfully submitted,

EDWARD S. ROGERS,
Amicus Curiae.